



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M92/2025
File Title: Chaplin v. Secretary, Department of Social Services & Anor
Registry: Melbourne
Document filed: Form 27E - Reply
Filing party: Appellant
Date filed: 24 Feb 2026

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

MATTHEW CHAPLIN

Appellant

and

SECRETARY, DEPARTMENT OF SOCIAL SERVICES

First Respondent

LEGAL AID NSW

Second Respondent

APPELLANT'S REPLY

PART I: FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

A. 'Ignoring' income

2. At RS [27], the Secretary contends that “[t]he appellant’s case was and is that his entitlement should have been reassessed without taking that income [relating to the appellant’s under-reporting of his employment earnings] into account”. This is wrong.
3. The appellant’s case is, as it has always been, that in determining whether to seek to recover a payment as a debt under s 1223, the Secretary should take all ordinary income into account: including the income that represents the difference between the appellant’s reported net, and unreported gross, ordinary income. However, that income (like all income) can only be taken into account according to law. Thus, it must be taken into account: (a) using the methods of accounting that Module H and Point H23 prescribe; and (b) by reference to the evidence available at the time the Secretary identifies and seeks to recover a debt. The Secretary appears to accept that, had the evidence available to the Secretary enabled him to raise a debt against the appellant using the “earned” method of account, only that method was, as a matter of law, permitted to be used to take the income into account: RS [64], [71].
4. The Secretary cannot depart from the method of accounting prescribed by the Act merely because the available evidence of when income was “earned” does not establish that a debt arises under s 1223. That is so even if the Secretary has suspicions that some overpayment may have occurred in some fortnights (because the appellant erroneously reported his net rather than gross income across a 12-month period). A generalised suspicion does not prove that the appellant “was not entitled” to the benefit of any specific payment (referable to a specific fortnight) such that a debt arose under s 1223. Nor does it justify a strained interpretation of the relevant provisions of the Act.
5. The issue is not whether all of the appellant’s ordinary income should be taken into account. The issue is whether the Act (in particular, the phrase “*where appropriate*” in Step 1 of Point H1: RS [30]) permits the Secretary: (a) to select and to retrofit the method of accounting for that income to the evidence, including by reason of deficiencies in that evidence; and (b) to undertake that selection of accounting method so as to achieve an outcome that the Secretary speculates to be approximately or possibly the correct one.

6. At RS [47], the Secretary seeks to avoid the conclusion that the reassessment of the appellant's entitlement to Youth Allowance in this case involved an "approximation" or "estimate" of the appellant's ordinary income by pointing to the fact that the Secretary had done "calculations" of the ordinary income that the appellant "received" in the relevant fortnight periods. However, the fact that the Secretary had calculated the appellant's "received" income with precision is beside the point. Even on the Secretary's case, the "received" method of account is a secondary or fallback method which may only be used where it is not possible to use the primary "earned" method: RS [71]. Where (as in this case) the evidence shows that the ordinary income was earned before it was received, the precise calculation of received income is only ever used as, and by reason of it being, a *proxy* (ie, an indirect estimate) of the income that the appellant must have "earned" during the relevant periods: see J [158]. The point that RS [47] elides is that the "received" method necessarily produces only an approximation or estimate of the income that the appellant "earned" during the relevant fortnightly periods and thus of the appellant's entitlement to Youth Allowances; regardless of how precisely that proxy was calculated.

B. The Secretary did not seek timesheets until 2024

7. At RS footnote 1, the Secretary disputes the suggestion at AS [11] and [41] "that, by the time information was requested of the appellant **in April 2019**, the appellant's former employer no longer held his timesheets." The appellant accepts, and adopts, this correction. There was no evidence that the Secretary took any step to obtain the appellant's timesheets before demanding repayment of the first alleged amount in October 2019. That is, the Secretary demanded a debt from the appellant without ascertaining whether the evidence available to the Secretary would have enabled the Secretary to use the "earned" method of account. The evidence showed that, when the Secretary came to pursue a second review of AAT1's decision in the General Division of the Tribunal **in February 2024**, the Secretary *then* sought those timesheets for the first time, but they were no longer available to the employer (RBFM, pp 1 - 11).

C. Ground 1

8. At RS [25]-[30] and [39]-[44], the Secretary seeks to defend the majority's decision on the basis that their Honours conceived of a "reassessment" of entitlement as only part of the decision under review. In doing so, the Secretary fails to engage with the substance

of Mr Chaplin’s case on Ground 1 (identified in RS [39]).

9. It is accepted that the majority conceived of the decision under review as involving: (a) a “reassessment”; (b) calculation of the amount of overpayment; and (c) deciding whether to demand repayment: RS [40]. But the majority stated that it is the *first* of these — “a decision by the original decision-maker that Mr Chaplin was not entitled to that which he had been paid” — that is the “essential starting point” from which “the remaining decisions ensued”: J [114].
10. According to the majority, “[i]f the original decision-maker was not satisfied that Mr Chaplin had an entitlement to part of the Youth Allowance he had received (see s 37 of the Administration Act), then the decision-maker would be satisfied that a debt arose by operation of the Act (see s 1223(1) of the Act)”: J [110]. From there, it was simply a matter of quantifying that debt (ie, the amount of Youth Allowance whose entitlement was not ascertainable on the reassessment): because “the original decision-maker knew Mr Chaplin had not made a correct disclosure of his income”, “[t]he real issue was how much Mr Chaplin had been overpaid”: J [155]. Their Honours then adopted what Mr Chaplin submits is an erroneous construction of Points H1 and H23 to enable the amount of “overpayment” to be calculated on an incorrect basis (“received” instead of “earned”: see Ground 3).
11. The Secretary’s submissions miss the point. On a fair reading of the majority’s reasons, their Honours erred by identifying the decision under review as (or as including) a “reassessment” that produced a conclusion that a debt was owed by reason of the decision-maker “failing to be satisfied that the recipient was entitled to the amount received”: J [153]. The error is compounded, not mitigated, by the majority going on to erroneously hold that the fortnightly amounts of that debt were to be calculated on a different basis to Mr Chaplin’s actual, original entitlements.

D. Ground 2

12. The submissions above on Ground 1 also apply to the Secretary’s submissions on Ground 2: RS [49]-[53]. It is accepted that the majority considered that the *amount* of an alleged debt was to be calculated on a fortnightly basis. But their Honours’ essential starting point was that “[n]o decision-maker acting reasonably could have been satisfied that the appellant was entitled to the whole of the payments he had received”: J [14(c)]. From — and by reason of (J [197]) — that premise, their Honours went on to adopt a

strained interpretation of Points H1 and H23 on the basis that (J [166]):

The legislature should not be taken to have intended (*Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]) that a decision-maker could not “raise a debt” on the basis that the decision-maker, although knowing that there had been an overpayment, could not tie the overpayment to a particular fortnight because of a lack of information.

13. Thus, their Honours considered that a decision-maker could “know” there had been an overpayment without being able to “tie” it to a particular fortnight. That was an error: their Honours wrongly considered that a decision-maker could be satisfied there was a debt due to the Commonwealth having regard to an aggregate of fortnightly payments, rather than each fortnight as s 1223(1) requires. No “selective” reading of their Honours’ reasons is involved in reaching that conclusion: RS [51].
14. The Secretary’s submissions ultimately amount to little more than an observation that their Honours considered the amount of a debt was to be calculated on a fortnightly basis. That observation fails to engage with the substance of the majority’s reasons as to how a decision-maker may be satisfied that a debt has arisen, with the reasons that the majority relied upon to justify using the “received” method of accounting for income, or with Mr Chaplin’s case.

E. Ground 3

15. **First**, the Secretary accepts, consistently with longstanding Federal Court authority, that a debt “arises as a result of the operation of s 1223(1) rather than as a result of any decision of the Secretary”: RS [23]. That tells strongly against the Secretary’s submission that debts may be raised using an entirely different accounting basis to the original entitlement (“received” instead of “earned”) depending on the evidence before a decision-maker. Either the available evidence shows that a debt has arisen based on the “single answer” that is produced by the Act, or it does not. If the available evidence does not show that a debt has arisen on the *correct* basis (here, “earned”), it is not open to the Secretary to raise a debt on an *incorrect* basis (here, “received”). Kennett J accepts this when his Honour observes that the availability of evidence cannot change “the content of the test”: J [238]; cf RS [59].
16. **Second**, the Secretary seeks to defend the “anomalous” outcomes that are apt to arise from the majority’s approach on two bases: (a) the majority’s observation that, “[i]n the absence of a basis for considering that information had not been accurately reported (or perhaps some administrative or other error), it would not generally be appropriate to

revisit a recipient’s entitlement”: J [154]; and (b) amendments to the Act that have recently been made: RS [60]. Neither point has real substance.

17. As to point (a), the Secretary ignores cases in which, while there might be some basis for his Department to *inquire* about a person’s past earnings, there was in fact no incorrect reporting or none that gave rise to an overpayment. In such a case, if the effluxion of time meant that the recipient was no longer able to prove the specific dates on which they earned particular income, and a debt was raised against them on a different basis to their original entitlement, that would be anomalous and unjust. In any event, the majority’s construction produces anomalous results in *every* case: in the absence of explicit statutory authorisation, it is anomalous for a debt to be raised against a social security recipient on a different accounting basis from their original entitlement.
18. As to point (b), the recent amendments to the Act are irrelevant. The Court is concerned with the proper construction of the relevant provisions as in force *prior* to those amendments.¹ If the majority’s interpretation of those provisions is apt to produce anomalous results (which it is), that is a reason to reject it.

F. Notice of contention

19. The Secretary’s notice of contention should be rejected. **First**, the Secretary mischaracterises Mr Chaplin’s argument regarding Point H1: RS [69]. Mr Chaplin does not submit that the income test in Module H can operate *without* Point H1. Rather, it is submitted that Point H1 is a generally worded provision, which identifies the particular steps that are to be applied in determining a person’s income reduction — it is not a “critical command” that is capable of overriding the specific instructions in those steps, including Point H23: cf RS [20], [62], [68].
20. **Second**, the Secretary’s argument is essentially purposive and ignores the statutory text. The Secretary submits that, because Point H23 casts a “wide net” to capture various kinds of income, that provision must be read so that the Secretary can take income into account on *any* of the three identified bases, depending on the available evidence. The Secretary’s argument fails because it starts with an “a priori assumption” about “the desired or desirable reach or operation of the relevant provisions” and then asks the Court to

¹ See *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at [51]-[52] (Gleeson CJ, Gummow, Kirby and Hayne JJ) regarding “the difficulties involved in using an amending Act to construe earlier legislation”.

contort Point H23 to conform to that purpose.²

21. **Third**, the “conjunctive” nature of the phrase “first earned, derived or received” does not justify the Secretary’s atextual reading of Point H23: RS [70]. It is common ground that income may be one or more of “earned, derived or received”. Here, Mr Chaplin’s income was “earned” and then later “received”. But the conjunctive nature of the phrase does not justify ignoring the word “*first*”, which requires that a given amount of income is only to be taken into account when the *first* of the three identified events occurs.³
22. **Fourth**, in substance, the Secretary asks the Court to read words into Point H23. He submits that, “[p]roperly construed, point 1067G-H23 provides for the application of an accounting methodology that yields a single and certain answer on the evidence available”: RS [59]. But Point H23 does not refer to, or qualify the operation of the word “first” by reference to, “the evidence available”. It brings income to account when that income is *actually* “first earned, derived or received”. The Secretary has not identified any basis on which words such as “on the evidence available” should be read into Point H23. On well-established principles, they should not be.⁴
23. The same may be said of the majority’s statement at J [198] that “[t]he word ‘first’ in Point H23 is intended to ensure that income is taken into account only once and directs that income is to be allocated to the earliest fortnight in which the income can be identified as being ‘first earned, derived or received’ on the available material”. The provision simply does not say that, and words to that effect cannot be read into the Act to suit the Secretary’s preferred policy outcome: cf RS [64]. In any event, “the available material” proved that Mr Chaplin first earned income, before he received it.

G. No concession that a debt has been established

24. Finally, the Secretary begs the question by referring to “[t]he overpayment of Youth Allowance, and therefore the debt arising under s 1223 of the SSA, that is in issue”: RS [10]. Contrary to RS [48(a)], it is not accepted that any “overpayment of Youth

² See AS [45] and the cases there cited. An additional problem is that the a priori assumption can be made only by making the error the subject of Ground 2.

³ Cf *Saravinovski v Saravinovska* [2017] NSWCA 85 at [33]-[34] (“for fee or reward”) and *Questions of Law Reserved (Nos 1 and 2 of 2023)* [2024] SASC 82 at [189] (“sent or transmitted”), on which the Secretary relies at RS footnote 12. Neither case involved a conjunctive phrase with an initial modifier — here, “first”.

⁴ *Taylor v Owners - Strata Plan No 11564* (2014) 253 CLR 531 at [18], [22]-[25], [38]-[39] (French CJ, Crennan and Bell JJ).

Allowance” or debt had been established in accordance with the Act (even if the fact of the appellant’s under-reporting of income established the *possibility* that a debt may have arisen in respect of one or more fortnightly payments).⁵ The Secretary asserts that there was an overpayment of Youth Allowance so as to ask this Court to interpret the Act in such a way as to ground that conclusion.

Dated: 24 February 2026



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⁵ The Secretary mischaracterises AS [45] as a concession to that effect: RS [48(a)]. It is not.